In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 411

CARLTON DRAPER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a trial by jury in the United States District Court for the Eastern District of Illinois, petitioner was convicted of receiving, concealing, etc., 45.45 grams of heroin which he knew had been unlawfully imported, in violation of 21 U.S.C. 174. He was sentenced to imprisonment for a period of ten years (App. 1).[1] The court of appeals affirmed (Pet. App. 1–7).

A narcotics agent listened with the consent of an informant to the latter's telephone conversation with petitioner. The informant told petitioner he had a buyer

[1] "App." refers to the appendix to petitioner's brief in the court of appeals, filed by petitioner as the record in this case. "Pet. App." designates the appendix to the petition for certiorari.

for the heroin and wanted to introduce him. Petitioner said "if the sale went down" he did not want to meet anyone other than the informant, but that he had two ounces and the price would be $1,200. On a similar call the following day, petitioner confirmed the arrangement and fixed a meeting place. The informant, after being searched and given money by narcotics agents, drove to the designated spot. Petitioner and a woman entered the informant's car. The agents then approached the car and saw petitioner seated in the front seat holding several aluminum foil packets, one of which was open and contained a white powder. They arrested petitioner and seized the packets, which proved to contain heroin (App. 3, 7).

Diligent efforts by the government to obtain the presence of the informant at trial were unsuccessful (App. 8). Petitioner testified that the informant, with whom he was well acquainted, had given him a package several days before the arrest, asking him to keep it temporarily. Although he suspected that the informant was engaged in the drug traffic and that the package was heroin petitioner agreed to keep the package (App. 9–10). Arrangements to pick it up had been made by two subsequent telephone calls. After petitioner had delivered the package to the informant's car, the arrest took place.

Petitioner's sole contention is that the government did not sustain its burden of proof because it offered no rebuttal testimony to contradict his testimony. Petitioner's version of the arrangement, however, was already contradicted by the testimony of the narcotics agent who listened to the telephone conversations in

which petitioner offered to sell two ounces of narcotics for a stipulated price. The issue is thoroughly canvassed in the opinion of the court of appeals which properly held that the question of entrapment was for the jury. *Masciale* v. *United States,* 356 U.S. 386.[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

AUGUST 1969.

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[2] Although petitioner does not raise a challenge to the validity of the presumption under 21 U.S.C. 174 which was charged in this case, the constitutional validity of that presumption is presently pending before the Court in *Turner* v. *United States*, No. 190, O.T., 1969. Accordingly, the Court may wish to defer disposition of the present petition until after it decides *Turner*.

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